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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 242

JACOB MORRIS DANZIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1853–1858) is reported at 161 F. 2d 299.

JURISDICTION

The judgment of the circuit court of appeals was entered April 23, 1947 (R. 1859). A petition for rehearing was denied July 8, 1947 (R. 1860). The petition for a writ of certiorari was filed August 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether an indictment must be dismissed for failure to summon women as grand jurors, although no motion to quash on such ground was made.

2. Whether a motion to dismiss for want of prosecution, made after the cause was set for arraignment, was properly denied.

3. Whether it was an abuse of discretion to deny a motion for continuance subject to developments at the trial.

4. Whether petitioner was prejudiced by the appointment of his counsel to represent two corporations which he controlled.

5. Whether it was proper to introduce records of a corporation controlled by petitioner which he had produced and identified before the Securities and Exchange Commission.

6. Whether testimony concerning the acts of a codefendant who testified for the Government was properly received against petitioner.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or

artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c. 38, Title 1, 48 Stat. 74 (15 U. S. C. 77a *et seq.*), provides in part:

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title

> * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On December 30, 1941, an indictment in 17 counts was returned in the United States District Court for the Southern District of California against petitioner, several individual codefendants, and two corporations (R. 2–66). The first seven counts charged separate violations of Section 17 (a) (1) of the Securities Act by the use of a scheme to defraud in the sale of securities in interstate commerce (R. 2–41); counts 8 to 11 charged violations of Section 5 (a) (2) by the mailing of unregistered securities (R. 41–52); counts 12 to 16 charged separate violations of the mail fraud statute (R. 52–62); and count 17 charged conspiracy (R. 62–66).

On November 20, 1944, petitioner was brought before the court for arraignment, and the cause

was continued for that purpose (R. 67).[1] Thereafter, petitioner filed a motion to dismiss for failure to prosecute in the three-year period following the return of the indictment (R. 68–72). That motion was denied (R. 73), and a trial ordered (R. 77). Petitioner filed a motion for continuance in which he referred to the three-year delay in arraigning him and alleged that he needed time to get depositions of witnesses in Trinidad and London who would testify to the fact that Trinidad International Petroleum, Ltd., one of the corporations named in the indictment, owned property whose "potential value" was great (Supp. R. 4–11). The court denied the motion and ordered the trial to proceed, stating, however, that the action was taken with the mental reservation that developments at the trial might show the need for a continuance, but that such matters could not be determined in advance (R. 385–386).

Summonses had been issued against the corporate defendants on January 4, 1945 (R. 78–79, 80–81), and service was made by leaving a copy with petitioner's secretary (R. 79, 81). At the opening of the trial, petitioner, through his attorney, disclaimed any authority to appear for the corporations (R. 380). The court indicated it

[1] The record shows that Warren C. Carter, a codefendant who subsequently pleaded guilty (R. 77–78) and testified for the Government (R. 1025), was not apprehended until October 20, 1944 (R. 1263). Two other codefendants had not been apprehended at the time of the trial and the case was dismissed as to them (R. 396).

would appoint petitioner's attorney to represent the corporations (R. 382, 387). The attorney stated that he felt that it was his duty to object since it was possible that the interest of the corporations would conflict with his duty to petitioner (R. 387–388). The court did, however, appoint petitioner's attorney to represent the corporations "subject to developments at the trial that may cause you to feel that your interest has become adverse" (R. 388). The corporations were convicted and fined (R. 148–151), but their convictions were reversed on appeal on the ground that they had not been properly served (R. 1856–1857, 1859).

Petitioner's counsel waived trial by jury (R. 392–394). Both petitioner and his counsel signed a written waiver to such effect on behalf of petitioner personally (R. 394), but the court accepted an oral statement on behalf of the corporations in view of the circumstances under which the attorney was appointed to represent the corporations (R. 394). Petitioner was acquitted on the registration counts, count 7 was dismissed by the Government, and petitioner was convicted on counts 1 to 6 and 12 to 17 (R. 1837). He was sentenced to imprisonment for 15 months on each count, the sentences to run concurrently (R. 146–147). On appeal, the judgment was affirmed (R. 1859).

The evidence for the Government may be summarized as follows:

Petitioner was president of Trinidad International Petroleum Ltd., a Nevada corporation organized in 1933 (R. 672–673, 680). The corporation acquired certain oil rights in the Island of Trinidad, involving about 200 parcels of land originally owned by three individuals. These individuals had a lease contract with a firm known as the Standard Mining Company, and it in turn had a subcontract with one Rousse. Rousse assigned his rights to Trinidad. (R. 681–684, 688–689.) Trinidad issued a million shares of stock of which 500,000 remained as treasury stock. The other 500,000 were issued to the Standard Mining Company, and of that amount 165,000 shares were given to Wake Development Company in return for petitioner's services. (R. 692–693.) Wake was beneficially owned by petitioner's wife, although for a time the stock was carried in the name of petitioner's sister (R. 694–695). Petitioner was an officer of Wake and managed it from its inception (R. 694–695).

The instant prosecution is based on sales of the Trinidad stock owned by the Wake Development Company. Petitioner admitted that the proceeds obtained by such sales were used for his own living expenses and represented his chief source of income (R. 706–707, 824).

The principal witness for the Government was petitioner's co-defendant, named in the indictment as Warren C. Carter (R. 2), but whose true

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name is Willard Eugene Warren (R. 1025). He met petitioner in New York in the early part of 1935 (R. 1067) and agreed to sell Wake-owned Trinidad stock for petitioner, receiving one-third of the proceeds as commissions and one-third for expenses (R. 1067–1068). In general, the method of sale was to obtain lists of stockholders of defunct corporations and offer such stockholders a "credit" for their stock toward the purchase of Trinidad stock and Trinidad preferential profit-sharing notes. The stockholders would be given the impression that the Trinidad stock was worth $5 per share and that the profit-sharing notes could be sold at about $4.80, whereas, with the credit allowance on his old stock, he was paying only $3 in cash (R. 1030–1042, 1051–1055, 1126–1127, 1134–1135).

The methods employed by Warren and petitioner's participation therein are illustrated by the transactions which form the basis of particular counts.

While petitioner was in England from 1935 to 1937 (R. 1082, 1122), Warren, using the name Edwards, called on Mrs. Parsons, who lived in Pottsville, Pennsylvania (R. 1092, 1097). He made three sales of Trinidad stock to her, one for $500, one for $3,000, and a third for $4,000 (R. 1096–1097). In the course of these transactions, Warren showed Mrs. Parsons a copy of a London newspaper that had been sent to him by petitioner, who had written that Warren would know how

to use it in the sale of the stock (R. 1101). The paper listed a number of oil stocks on British exchanges bearing Trinidad in their names (R. 1101). Petitioner wrote from London that he would like to get over a nice sale, and that "The president will be glad to call on Parsons and explain the encouraging results to date." He enclosed a copy of a letter he had sent to Mrs. Parsons from London (Ex. 105, R. 1095–1096; see R. 1121–1122).[2] When petitioner returned from England in July 1937, he asked if it would not be possible to do something further in the Parsons matter (R. 1103, 1122). Warren stated that he had made too many visits and that a new personality should be injected (R. 1103). He told petitioner that he had arranged to have a Mr. Robbins represent himself as Mr. Winslow, petitioner's financial agent, who was offering a block of stock at prices substantially lower than they were being sold on the market (R. 1103–1104). Robbins brought Warren Mrs. Parsons' check to the order of A. R. Winslow for $7,000. The check was cleared through Wake and petitioner received $1,600 out of the proceeds (R. 1106). The transactions with Mrs. Parsons form the basis of count 1 of the indictment, the specific

[2] In his testimony before the Securities and Exchange Commission, petitioner at first denied corresponding with Mrs. Parsons (R. 806), but later admitted that he had written to her (R. 857). When he took the stand in his own behalf, he admitted writing to Mrs. Parsons from England (R. 1757).

mailing being a covering letter transmitting the Trinidad shares acquired in the latest deal (R. 14–15; Gov. Ex. 85, R. 874, 876).

In August 1939, Warren, using the name Edwards, called on a Miss Skinner, a stockholder in Great Eastern Natural Gas Co. (R. 547–549, 1150).[3] Warren told Miss Skinner that he represented a company which was interested in purchasing the Trinidad notes which he understood she held (R. 549, 1151). When she stated that she did not own any, he advised her to write to the Trinidad Company and see if she could not exercise her rights (R. 550–551, 1151–1152). He told her that the Trinidad stock was very good, and that it was listed on the London stock exchange (R. 551–553, 1151, 1152). Warren wrote a letter to Wake and told them to expect an inquiry (R. 1153). Subsequently, when Wake informed him that no reply had been received to the letter explaining the offer, Warren sent another salesman to call on Miss Skinner (R. 1155; see R. 559–560). Miss Skinner eventually did buy Trinidad stock, sending to Wake a cashier's check of a Farmingdale, New Jersey, bank, which was deposited to the Wake account and collected (R. 562). The collection of this check forms the basis for count 5 (R. 29–32).

A number of other counts of the indictment

[3] Miss Skinner testified for the Government, and her testimony corroborates Warren's (R. 547, ff.).

were based on sales of Trinidad stock to stockholders in Canadian mining companies—Mrs. Lawyer (count 2, R. 16–18; count 14, R. 57–59); Mr. Pitts (count 3, R. 18–20); Mr. Russell (count 4, R. 21–23); Mr. Smith (count 6, R. 33–37; count 16, R. 61–62). In each case, Warren approached the stockholder and stated that he represented a Canadian firm which was interested in buying the Trinidad notes which he understood the stockholder owned, stating that the shares had a par value of $5.00 and that the notes could be sold for approximately $4.80. When the stockholder denied having the stock, Warren would suggest that he write to Wake and exercise his rights. Warren would then write to Wake himself and tell them that an inquiry would be forthcoming. In each case, the sale of Trinidad stock was eventually made, although Mr. Russell attempted to cancel the transaction. (R. 1126–1127, 1134–1135, 1140–1147, 1163–1167.) In the case of Mrs. Lawyer, Warren had an interchange of correspondence with petitioner in which he advised petitioner not to accept her offer made on the understanding that she expected to resell the stock. The sale was not consummated until she wrote in a letter that she was accepting the Trinidad stock merely on its speculative merits. (R. 1127–1131; see R. 771–797.)

In June 1938, Warren, using the name Roberts, called on Dr. J. Arthur Hazelton, a dentist in

Mantua, N. J. (R. 450–453, 454, 1184).[4] Warren succeeded in getting Hazelton to exchange certain stock which he held in return for Trinidad stock (R. 451, 462–466, 1184–1889). Warren told Hazelton the Trinidad stock was listed on the London Exchange and that they had a concession from the British Government to dispose of the oil (R. 467). Hazelton received communications from Wake about the value of Trinidad stock (Gov. Exs. 24, 25, R. 474, 475).

In 1940, Warren wrote to petitioner, stating that he was going to try to make "a new deal" with Hazelton, and asked petitioner if he could furnish him with new material (R. 1198–1199). Warren called on Hazelton and told him that the Trinidad stock had not gone up as much as he had expected, but that he had every reason to believe that a block of shares was being taken over by a syndicate; that Hazelton's holdings were not adequate to enable him to participate, and that he ought to increase his holding for that purpose (R. 488, 499–500, 1206). Hazelton replied that he was unable to make any further investment, but he did agree to give Warren $700 to finance a trip to California and Trinidad to close the deal (R. 488–493, 1207). Hazelton sent a $300 cashier's check to Wake, in care of Roberts (Warren), and four postal money orders for $100 (R. 490–491). Warren wrote to petitioner that

[4] Dr. Hazelton testified for the Government and corroborated Warren (R. 449 ff).

he would receive the check and subsequently received a letter stating that the check had been deposited for collection (R. 1208). Warren, using the name Roberts, wrote a letter to Hazelton which he sent to petitioner to remail from California to reflect the fact that Roberts was in California. In the letter, Roberts reported that he was about to leave for the property in Trinidad (R. 1209; Gov. Ex. 34, R. 505). This letter is the basis of count 12 (R. 52–55), and the $300 check is the basis of count 13 (R. 55–57).

Petitioner testified before the Securities and Exchange Commission in connection with their investigation of his activities. He admitted that the Trinidad stock was not listed on any stock exchange (R. 705–706); that Trinidad has never qualified to develop its properties (R. 707); and that the property was not producing oil (R. 767–768). He admitted that he knew that the stock turned in for Trinidad shares was worthless (R. 726–727). He admitted writing to Dr. Hazelton (R. 750–751), but stated that he had never met Mr. Roberts and could not remember dealing with him (R. 753–754). He also said that he did not know a Mr. Edwards (R. 856, 863, 913). He testified about many transactions with Winslow and said that Winslow had obtained the list of Canadian mine stockholders (R. 710, 718, 730–731, 771).[5] He denied having any dealings with

[5] Cf. Warren testimony that Winslow was a fictitious person (R. 1103–1104).

Carman (Warren, known as Carter; see R. 721–722) or sending any funds to him after the summer of 1937 (R. 723–724, 839, 954, 955).

ARGUMENT

Without arguing any point in detail, petitioner raises a number of questions, none of which presents an issue of merit.

1. Although he made no motion to dismiss the indictment because of the failure to summon women as grand jurors, petitioner now argues (Pet. 17, 20) that the decision of this Court in *Ballard* v. *United States,* 329 U. S. 187, requires dismissal of the indictment. However, by the statute in effect at the time (18 U. S. C. 556a), petitioner's failure to move to dismiss the indictment within 10 days after his arraignment precludes him from having the indictment dismissed because of an irregularity in the impanelling of the grand jury.

2. The denial of petitioner's motion to dismiss for want of prosecution (see Pet. 17) was proper, since at no time in the three-year period following the indictment did petitioner seek to have a trial date set. *Daniels* v. *United States,* 17 F. 2d 339, 344 (C. C. A. 9), certiorari denied *sub. nom Appell* v. *United States,* 274 U. S. 744; *Pietch* v. *United States,* 110 F. 2d 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8); *Collins* v. *United States,* 157 F. 2d 409 (C. C. A. 9). The

record shows that the case was brought to trial very soon after the apprehension of Warren (fn. 1, *supra*, p. 5).

3. The denial of petitioner's motion for a continuance (see Pet. 18, 20) did not constitute an abuse of discretion. The trial judge made it clear that he would grant an adjournment if the need therefor was shown at the trial. The evidence adduced at the trial shows that the testimony for which the adjournment was sought—evidence designed to show the "potential value" of the Trinidad oil properties—was clearly irrelevant. By petitioner's own admission before the Securities and Exchange Commission, the potentialities of the property had never been realized. Those potentialities, if they existed, would in no way justify the selling methods disclosed by the evidence. It is significant that no motion for a continuance was made during the trial.

4. The action of the court in appointing petitioner's counsel to represent the two corporations (Pet. 17, 19, 20) did not prejudice petitioner. His own testimony before the Securities and Exchange Commission shows that the corporations were merely his alter ego. Furthermore, counsel never claimed a conflict of interest during the trial.

5. The contention that there was a variance between the indictment and proof as to the number of conspiracies proved (Pet. 19, 22) is frivolous. All the evidence adduced by the Government related to the manner in which petitioner, through

Warren, made fraudulent sales of Trinidad stock. The fact that different methods were used at different times does not constitute a variance.

6. The insinuations against the fairness of the trial judge (Pet. 6–7, 13–14, 15, 22) are wholly unwarranted, as appears from the record references which petitioner himself cites.

7. As to the admission of documentary evidence (Pet. 18), in view of petitioner's own statements that he managed Wake from its inception (R. 694–695), that his sister had authority to act on his behalf (R. 732, 824, 924), and that, after her death in September 1939, he handled all correspondence himself (R. 724, 751, 924), it is difficult to understand his contention that the Wake files which he himself produced before the Securities and Exchange Commission should not have been admitted against him. Furthermore, in petitioner's oral testimony before the Commission, he specifically identified a number of documents, including letters written to persons whose purchases of stock form the basis of individual counts (R. 750–752, 757, 759, 765, 771, 776, 780, 815, 825–828, 852, 855, 858, 896, 909, 919–920).

8. The argument that petitioner was improperly held liable for Warren's activities (Pet. 18, 21) is answered by the evidence as set forth in the Statement, *supra*. It is clear that petitioner knew of Warren's activities, that he assisted Warren by letters written to the persons to whom stock was sold, and that he adopted War-

ren's acts and received the proceeds thereof. The letters which petitioner identified in his testimony before the Securities and Exchange Commission in themselves amply establish his participation in the scheme proved.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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